

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

CHERYL FEALY,

Plaintiff,

v.

WELLS FARGO BANK,

Defendant.

Case No. 2:13-CV-02340-APG-PAL

**ORDER**

(Dkt. ## 8, 9, 10, 13, 16, 18)

Plaintiff Cheryl Fealy alleges Defendant Wells Fargo Bank improperly removed from her bank account funds which consisted of deposits of social security benefits, in response to a notice of levy from the Internal Revenue Service (“IRS”). Wells Fargo failed to timely respond after being served with Fealy’s Complaint, so default was entered against it. Wells Fargo requests that I set aside the default because its failure to respond to the Complaint was the result of a mistake, Wells Fargo has meritorious defenses, and Fealy would not be prejudiced. Fealy requests I enter default judgment Wells Fargo, and also moves for summary judgment on the merits. Wells Fargo responds by requesting summary judgment be entered in its favor instead. I will set aside the default and enter summary judgment in Wells Fargo’s favor because Wells Fargo is entitled to immunity for complying with the IRS’s notice of levy.

**I. Jurisdiction**

Although the parties do not raise the issue, I have an independent obligation to ensure this Court has subject matter jurisdiction over this dispute. *United Investors Life Ins. Co. v. Waddell & Reed, Inc.*, 360 F.3d 960, 966-67 (9th Cir. 2004). Pursuant to 28 U.S.C. § 1331, federal district courts have original jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” “A case ‘arises under’ federal law either where federal law creates the cause of action or ‘where the vindication of a right under state law necessarily turn[s] on some construction of federal law.’” *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088-89

1 (9th Cir. 2002) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8-9  
2 (1983)).

3 Here, Fealy alleges Wells Fargo breached its duties to her because an IRS notice of levy,  
4 as opposed to a warrant or some other judicial process, is insufficient to compel a turnover of the  
5 funds. Determining whether Wells Fargo breached its duties to Fealy thus requires a construction  
6 of federal law regarding whether the IRS's notice of levy sufficed to compel Wells Fargo to turn  
7 over the funds to the IRS. Consequently, I have subject matter jurisdiction over this dispute.

## 8 **II. Default Judgment**

9 Fealy served Wells Fargo with her Complaint on December 27, 2013. [Dkt. #4.] Wells  
10 Fargo did not respond to the Complaint, and the clerk of court entered default on February 10,  
11 2014. [Dkt. #8.] Fealy moved for default judgment on February 12, 2014 [Dkt. #9], and two days  
12 later, Wells Fargo moved to set aside the default [Dkt. #10].

13 The clerk of court must enter default against a party who has "failed to plead or otherwise  
14 defend" an action. Fed. R. Civ. P. 55(a). "The court may set aside an entry of default for good  
15 cause . . . ." Fed. R. Civ. P. 55(c). When determining whether good cause exists, the court  
16 considers (1) "whether the defendant's culpable conduct led to the default," (2) "whether the  
17 defendant has a meritorious defense," and (3) "whether reopening the default judgment would  
18 prejudice the plaintiff." *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001),  
19 *overruled on other grounds*, *Egelhoff v. Egelhoff ex. rel. Breiner*, 532 U.S. 141 (2001). With  
20 regard to the first factor, "a defendant's conduct is culpable if he has received actual or  
21 constructive notice of the filing of the action and intentionally failed to answer." *Id.* at 697  
22 (emphasis and quotation omitted). However, if the defendant offers a good faith explanation for  
23 its neglectful failure to answer, and that explanation negates any intent to take advantage of the  
24 plaintiff, interfere with judicial decision-making, or otherwise manipulate the legal process, such  
25 failure is not "intentional." *Id.* at 697-98. A defendant's conduct is culpable "where there is no  
26 explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to  
27 respond." *Id.* at 698.

1 To satisfy the “not extraordinarily heavy” burden of presenting a meritorious defense, the  
2 defendant seeking to vacate a default must present specific facts that would constitute a defense.  
3 *Id.* at 700. There must be some possibility that the suit would have a different outcome at trial  
4 than the result achieved by default. *Hawaii Carpenters’ Trust Funds v. Stone*, 794 F.2d 508, 513  
5 (9th Cir. 1986).

6 Finally, with respect to prejudice, “[t]he standard is whether [the plaintiff’s] ability to  
7 pursue his claim will be hindered.” *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984). To be  
8 considered prejudicial to the plaintiff, setting aside a default must do more than simply delay  
9 resolution of the case. *TCI*, 244 F.3d at 701. Rather, the delay must result in some tangible harm,  
10 such as “loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or  
11 collusion.” *Id.* (quotation omitted). Similarly, requiring a plaintiff to adjudicate a claim on the  
12 merits does not constitute prejudice. *Id.*

13 As to the first factor, Wells Fargo has presented evidence that its failure to respond was  
14 not intentional, but was the result of an internal miscommunication. Wells Fargo store manager  
15 Tanequa Edwards received the Complaint in December 2013. [Dkt. #10-1.] Edwards called an  
16 advisory number within Wells Fargo, was instructed to send the papers to Wells Fargo’s legal  
17 department, and she faxed the papers as instructed. [*Id.*] Edwards states it is her “understanding  
18 that the department has no record of receiving [her] fax transmission regarding these papers.”  
19 [*Id.*] There is no basis to conclude that Wells Fargo’s failure to respond reflects an intent to take  
20 advantage of Fealy, to interfere with judicial decision-making, or to otherwise manipulate the  
21 legal process.

22 As for the second factor, Wells Fargo has presented meritorious defenses. The Complaint  
23 alleges Wells Fargo turned over \$15,661.58 to the IRS, but Wells Fargo presents evidence it  
24 turned over \$12,364.73. [Dkt. #10-2 at 3, 12.] Wells Fargo thus has a meritorious factual defense  
25 on the amount owed, if any. Additionally, as discussed below, Wells Fargo is immune from  
26 liability under federal law for turning over the funds to the IRS when confronted with a notice of  
27 levy. *See* 26 U.S.C. § 6332(e).



1 Finally, Fealy would suffer no prejudice if I set aside the default. Wells Fargo responded  
2 within two days of Fealy's motion for default judgment, and Fealy has not identified any tangible  
3 harm she would suffer if I set aside the default. I therefore grant Wells Fargo's motion to set  
4 aside the clerk's entry of default, and I deny Fealy's motion to enter default judgment.

### 5 **III. Summary Judgment**

6 Fealy moves for summary judgment, contending that Wells Fargo improperly turned over  
7 funds in her account to the IRS based on a notice of levy. Fealy contends the funds in her account  
8 are social security benefits, and thus are exempt from levy. Fealy further argues that even if the  
9 funds are not exempt, a notice of levy is not a sufficient basis to turn over the funds. Rather,  
10 Fealy argues the IRS must obtain a warrant or some other judicial process to levy her account.

11 Wells Fargo responds that social security accounts are not exempt from levy, and that a  
12 notice of levy is sufficient to require Wells Fargo to turn over the funds. Wells Fargo further  
13 argues that it is immune from liability for complying with an IRS notice of levy. Wells Fargo did  
14 not file a separate motion for summary judgment, but in its response to Fealy's summary  
15 judgment motion it requests that I grant summary judgment in its favor.

16 Title 26 U.S.C. § 6332(a) provides:

17 Except as otherwise provided in this section, any person in possession of (or  
18 obligated with respect to) property or rights to property subject to levy upon which  
19 a levy has been made shall, upon demand of the Secretary, surrender such property  
20 or rights (or discharge such obligation) to the Secretary, except such part of the  
property or rights as is, at the time of such demand, subject to an attachment or  
execution under any judicial process.

21 A bank "shall surrender (subject to an attachment or execution under judicial process) any  
22 deposits (including interest thereon) in such bank only after 21 days after service of levy." 26  
23 U.S.C. § 6332(c). A bank that does not comply may be liable to the United States "in a sum  
24 equal to the value of the property or rights not so surrendered," as well as for costs, interest, and a  
25 penalty. *Id.* § 6332(d)(1)-(2). A bank that complies with the levy and surrenders the property  
26 "shall be discharged from any obligation or liability to the delinquent taxpayer and any other  
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28

1 person with respect to such property or rights to property arising from such surrender or  
 2 payment.” *Id.* § 6332(e).

3 A “bank served with an IRS notice of levy has only two defenses for a failure to comply  
 4 with the demand.” *United States v. Nat’l Bank of Commerce*, 472 U.S. 713, 721-22 (1985)  
 5 (quotation omitted). The first defense is that the bank does not possess or is not “obligated with  
 6 respect to’ property or rights to property belonging to the delinquent taxpayer.” *Id.* (quoting 26  
 7 U.S.C. § 6332(a)). The second defense is “that the taxpayer’s property is ‘subject to a prior  
 8 judicial attachment or execution.’” *Id.* (quotation omitted).

9 Courts repeatedly have upheld the IRS’s use of the notice of levy procedures. *See, e.g., id.*  
 10 at 720-21 (“In the situation where a taxpayer’s property is held by another, a notice of levy upon  
 11 the custodian is customarily served pursuant to § 6332(a). This notice gives the IRS the right to  
 12 all property levied upon, . . . and creates a custodial relationship between the person holding the  
 13 property and the IRS so that the property comes into the constructive possession of the  
 14 Government.” (internal citation omitted)); *Stead v. United States*, 419 F.3d 944, 946-47 (9th Cir.  
 15 2005); 26 C.F.R. § 301.6331-1(a)(1).<sup>1</sup> The notice of levy “does not determine whether the  
 16 Government’s rights to the seized property are superior to those of other claimants; it, however,  
 17 does protect the Government against diversion or loss while such claims are being resolved.”  
 18 *Nat’l Bank of Commerce*, 472 U.S. at 721.

19 Here, Wells Fargo received a notice of levy from the IRS. [Dkt. #20-1.] At that point,  
 20 Wells Fargo had only two defenses to justify not complying, neither of which applies in this case.  
 21 Fealy has presented no evidence that Wells Fargo did not possess or was not obligated with  
 22 respect to Fealy’s account at Wells Fargo. Likewise, Fealy has presented no evidence that the  
 23 account funds were subject to a prior judicial attachment or execution. Wells Fargo thus was  
 24 required to comply with the notice of levy, and Wells Fargo is immune from liability to Fealy  
 25 under § 6332(e) for having done so.

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 27 <sup>1</sup> *See also In re Beam*, 192 F.3d 941, 945 (9th Cir. 1999); *United States v. Donahue Indus., Inc.*,  
 28 905 F.2d 1325, 1330 (9th Cir. 1990); *Schiff v. Simon & Schuster, Inc.*, 780 F.2d 210, 212 (2d Cir. 1985)  
 (collecting cases).

1 Fealy argues that a notice of levy is insufficient to compel Wells Fargo to turn over the  
2 funds to the IRS. This argument is foreclosed by the law cited above, as courts repeatedly have  
3 concluded a notice of levy suffices. Likewise, Fealy is incorrect when she states that Wells Fargo  
4 should have investigated whether she owed delinquent taxes before turning over the funds.  
5 Neither the statute nor the cases interpreting it requires a bank in Wells Fargo's position to  
6 investigate the alleged delinquency, and § 6332(e) absolves Wells Fargo of any responsibility for  
7 turning over the funds. *See Schiff*, 780 F.2d at 212 ("The fact that appellant disputes the validity  
8 of the underlying tax assessment does not alter Simon & Schuster's obligation to honor the  
9 levy."). Moreover, as discussed above, the levy does not determine the respective rights to the  
10 funds, nor does the levy determine whether the funds in the account were exempt from levy  
11 because they were social security benefits. Those are matters between Fealy and the IRS, and the  
12 IRS is not a party to this action. Because Wells Fargo is immune from liability under § 6332(e)  
13 for complying with the IRS's notice of levy, I deny Fealy's motion for summary judgment and  
14 grant summary judgment in Wells Fargo's favor. *See* Fed. R. Civ. P. 56(f).

#### 15 **IV. Conclusion**

16 IT IS THEREFORE ORDERED that Plaintiff's Motion of Default [Dkt. #9], Motion to  
17 Uphold Default Judgment [Dkt. #13], and Motion to Uphold Default Judgment [Dkt. #16] are  
18 hereby DENIED.

19 IT IS FURTHER ORDERED that Defendant's Motion to Set Aside Entry of Default [Dkt.  
20 #10] is hereby GRANTED. The Clerk's Entry of Default [Dkt. #8] is hereby set aside.

21 IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment [Dkt. #18] is  
22 hereby DENIED.

23 IT IS FURTHER ORDERED that the Clerk of Court shall enter Judgment in favor of  
24 Defendant Wells Fargo and against Plaintiff Cheryl Fealy.

25 DATED this 26th day of September, 2014.

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ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE